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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/695,066	10/27/2003	Kenneth Minton	DES/1250.0033	6008

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EXAMINER

REDDING, DAVID A

ART UNIT	PAPER NUMBER
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1744

DATE MAILED: 11/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/695,066

**Applicant(s)**

MINTON, KENNETH

**Examiner**

David A Redding

**Art Unit**

1744

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_.

## DETAILED ACTION

### *Double Patenting*

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-12 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-12 of copending Application No. 10/861,984. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claimed contact plate has the identical structure of the petri dish and is capable of functioning as a petri dish.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-8,10,11, are rejected under 35 U.S.C. 103(a) as being unpatentable over USP 6,602,704 B1 (Maxwell et al.) in view of USP 5,638,976 (Arnold).

The Maxwell et al. patent discloses a contact similar to that claimed by applicant (see figure 2). The patent discloses that the contact plate comprises a circular dish supported on a base (104), the dish having a bottom plate (135) and bottom circular side wall (130); a lid (102) having a top plate and a cylindrical sidewall (106), the lid is sized to fit over the bottom cylindrical sidewall (see figure 6). The patent further reveals that the contact plate has a lock means for securing in a fixed-fashion the lid to the base. The locking means comprises a plurality of ribs (120) on the inside of the lid sidewall (106) which provide a frictional fit with the outer wall of the bottom sidewall (130) (see figure 6). The patent discloses that the contact plate is designed to hold a microorganism growth medium as defined in claim 11 (col.1, lines 11-12). Further, the patent discloses that the contact plate base has a multiplicity of spacers (112) (cl. 10) for preventing the lid from sealingly engaging the base. The Maxwell et al. patent is silent as to the locking means claimed by applicant.

The USP 5,638,976 to Arnold discloses a container (10) with a locking lid (21) comprising a locking means identical to that claimed by applicant. The Arnold patent shows a lid having a pair of radial sheaths (22) having an entry (27) and a closed end (26) and a container with a mating pair of elongate radial tabs (16) sized and shaped so as to slidably engage with the radial sheath (22) (col.2, lines 20-39). Figures 17 and 18 show protrusions (122, lid) (112, container) and indents which matingly engage one another.

Accordingly, it would have been obvious to one skilled in the art to replace the locking means in the Maxwell et al. contact plate with the sheath and engagable tab locking mechanism disclosed in the Arnold plate in view of the known use to use a sheath and engagable tab locking means for securing a lid to a base.

The Arnold patent does not disclose the sheath integral with the base as defined in claim 5. The court has ruled that the mere reversal of parts is an obvious expedient. (In re Gazda, 219 F.2d 449, 104 USPQ 400 (CCPA 1955) (Prior art disclosed a clock fixed to the stationary steering wheel column of an automobile while the gear for winding the clock moves with steering wheel; mere reversal of such movement, so the clock moves with wheel, was held to be an obvious expedient.). Accordingly, the limitations of claims 5-8 are considered to be an obvious expedient of the sheath/tab arrangement disclosed in Arnold.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over USP 6,602,704 B1 (Maxwell et al.) in view of USP 5,695,988 (Chong).

The Chong patent discloses a microorganism contact plate comprising a transparent base and cover (col.6, lines 27-28). It would have been obvious to one skilled in the art to make the base and cover in the Maxwell et al patent in order to observe the progress of microorganism growth especially in view of the known practice as disclosed in Chong.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over USP 6,602,704 B1 (Maxwell et al.) in view of USP 4,634,676 (Sapatino).

Maxwell et al. is silent as to providing sterile packaging. The Sapatino patent discloses that it is desirable to provide a contact plate in a sterile condition by providing packaging (col.3, lines 15-17). Accordingly, it would have been obvious to one skilled in the art provide the Maxwell et al. contact plate in sterile packaging in order to ensure that the plate is not contaminated prior to use, especially in view of the known practice disclosed in Sapatino.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David A Redding whose telephone number is 571-272-1276. The examiner can normally be reached on Mon.-Fri. 6:00 - 3:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Warden can be reached on 571-272-1281. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



DAR

**DAVID A. REDDING  
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